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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEE TRAHAN,

Defendant and Appellant.

D073478

(Super. Ct. No. SCN313268)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed.

Sheila Quinlan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Lee Trahan of assault on a child causing death (Pen. Code, § 273ab, subd. (a)) and manslaughter (Pen. Code, § 192, subd. (a)) in connection

with the death of his six-week-old twin daughter Willow.<sup>1</sup> The jury found Lee's wife, Jessica Trahan, guilty of misdemeanor child abuse (§ 273a, subd. (b)).<sup>2</sup> In the original sentencing proceedings, the trial court found that section 654 applied and prevented the court from punishing Lee on both convictions because they arose from the same conduct. The court, reasoning that probation did not constitute *punishment*, granted Lee summary probation on the child abuse homicide conviction, and sentenced him to the aggravated term of 11 years on the manslaughter conviction. In a previous appeal brought by the People, we held this sentence was unauthorized and remanded for resentencing.<sup>3</sup> (See *People v. Trahan* (Apr. 4, 2017, D069091) [nonpub. opn.] (*Trahan I*)). On remand, the trial court denied probation and sentenced Lee to the statutorily prescribed term of 25 years to life on the child abuse homicide conviction, and imposed (but stayed under § 654) the aggravated term of 11 years on the manslaughter conviction.

In this appeal, Lee raises three issues regarding his resentencing. First, he contends he received ineffective legal representation because his trial counsel failed to argue that section 654 did not apply, which would have allowed the trial court to grant him probation on the child abuse homicide conviction and sentence him to 11 years on

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise indicated. We refer to the offense enumerated in section 273ab, subdivision (a) as child abuse homicide. (See *People v. Wyatt* (2010) 48 Cal.4th 776, 779.)

<sup>2</sup> We will refer to Lee and Jessica by their first names for clarity. Jessica is not a party to this appeal.

<sup>3</sup> We also remanded for further proceedings not relevant to this appeal.

the manslaughter conviction. Second, he contends the trial court erred by finding his sentence of 25 years to life on the child abuse homicide conviction did not constitute cruel and unusual punishment. Finally, he contends the trial court abused its discretion by denying probation on the child abuse homicide conviction. For reasons we will explain, these contentions are all without merit. Accordingly, we affirm.

### FACTUAL BACKGROUND

The factual background is set forth in detail in our opinion in *Trahan I*. We only briefly summarize the relevant facts here.

Willow and her twin brother K.T. were born in mid-March 2012.<sup>4</sup> Although they were delivered about six weeks prematurely, they were generally healthy.

On April 9, Jessica took Willow to the emergency room because Willow had a bruise on her abdomen. The examining doctor was "concerned" because she could not identify any "medical disease, deficiency or anything" to account for the bruising. The parents denied anything happened to Willow and asked if her car seat could have caused the bruising. The doctor had never seen a child sustain this type of injury from a car seat alone, and she observed that Willow's bruise was larger than the area overlaid by the straps and buckle. Hospital staff reported the incident to child welfare services (commonly and hereafter referred to as CPS). Willow was discharged April 11.

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<sup>4</sup> Lee was acquitted of abusing K.T. We therefore mention K.T. only when necessary to provide context for the issues currently before us.

The next day, a CPS caseworker visited the Trahans' home unannounced. After some investigation, the caseworker "found nothing suspicious for abuse," but she kept the case open because "in the back of [her] mind there's always the unexplained bruise to the infant."

On April 16, Lee and Jessica exchanged text messages about an incident that occurred earlier that morning. Lee wrote, "I wasn't hitting her to hurt her it was like . . . I don't know[.]" Jessica admonished him, "You have to compose yourself when waking from sleep to handle the babies so that you don't snap." Lee replied, "[I] know I just snapped[.] It will never happen again[.]" Jessica warned, "I just keep thinking if you had actually hurt her[.] They would have taken them all from us[.]"

On April 24, Lee and Jessica exchanged text messages about another incident. Jessica wrote that Willow was having difficulty eating and "looks beat up." Jessica sent a picture showing bruising to Willow's face. Lee explained that when he was feeding her in the early morning hours, she dropped her pacifier and, when he bent down to pick it up, he lost his balance and caused Willow to strike the doorjamb. The parents agreed that due to Willow's appearance and the open CPS case, they could not take her to the doctor for examination.

At about 4:30 a.m. on April 27, emergency responders were dispatched to the Trahans' residence in response to a 911 call reporting that an infant had stopped breathing. When they arrived, Lee was performing CPR on Willow. Medics transported her to the hospital.

Upon arrival, Willow was in critical condition. She was intubated and not breathing on her own. She had bruising on both sides of her face, a skull fracture, hemorrhaging around the brain, swelling and bruising on both sides of the brain, retinal hemorrhages in her left eye, and apparent compression fractures in three vertebrae.

In light of Willow's injuries and the open CPS case, a police officer interviewed Jessica at the hospital. Jessica asked, "Do you think Lee is abusing Willow? I have to know because I have to protect my other children." Jessica told the officer that Lee was "a hothead," but she denied he ever hit her or the children.

Jessica also asked one of Willow's treating physicians whether Willow's injuries were from a "shaken baby." The doctor responded that Willow had a number of unexplained injuries, and asked Jessica why she wondered about that. Jessica responded, "I know that this didn't just happen. . . . I'm not stupid."

Doctors monitored and treated Willow for the next 10 days. CT scans of her brain showed continued swelling and increased brain hemorrhages. Willow died on May 7.

The deputy medical examiner who conducted Willow's autopsy determined her cause of death was blunt force trauma to the head, and her manner of death was homicide. He opined that Willow's head trauma resulted from the application of "a great degree of force" comparable to a serious car accident, a fall from a great height, or a television falling on a child's head. He determined Willow's vertebral fractures and head injuries had separate causes.

The prosecution's medical experts agreed Willow's brain injuries were so serious that they probably occurred hours—not days—before her heart and breathing stopped on

April 27. The experts also ruled out other causes of Willow's bone injuries (e.g., metabolic bone disorders or birth-related conditions), and expressly ruled out a hypothetical in which Lee stumbled while carrying Willow and accidentally caused her head to strike a doorjamb.

Forensic analysis of the Trahans' electronic devices determined that some text messages—including texts on April 16 and 24—had been deleted from Lee's and Jessica's phones. Lee acknowledged at trial that he "more than likely" deleted some April 16 messages because he "didn't want CPS to ever find [them]."

A backup of Jessica's phone had a deleted bookmark for an online forum titled, "How can I help my husband tolerate the sound of our crying baby?" Lee's computer had accessed an online forum addressing the query, "Is it normal to get mad about your crying and screaming baby?"

In his defense, Lee claimed the text messages about "snapping" and "hitting" did not relate to Willow. He presented extensive medical expert testimony disputing the prosecution experts' conclusion that Willow died from inflicted blunt force trauma. The defense experts asserted Willow's broken bones result from a metabolic bone condition, and her cranial bleeding could have resulted from premature birth or other innocent causes.

## PROCEDURAL BACKGROUND

### *Original Sentence*

A jury found Lee guilty of child abuse homicide (§ 273ab, subd. (a)); and not guilty of murder, but guilty of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)).

The prosecution asked the trial court to deny probation, sentence Lee to the statutorily prescribed sentence of 25 years to life on the child abuse homicide conviction (§ 273ab, subd. (a)), and impose (but stay under § 654) an aggravated 11-year term on the manslaughter conviction. Lee asked the court to grant him probation. Because section 654 prohibits double punishment and requires the court to impose "punish[ment] under the provision that provides for the longest potential term of imprisonment" (§ 654, subd. (a)), the parties agreed the trial court was required to sentence Lee on the child abuse homicide conviction, leaving the court to choose between "25 to life," or "probation and he gets out."

The trial court disagreed that it was "pinned down in choices." Recognizing that section "654 comes into play," and positing that probation does not constitute "punishment" subject to section 654's prohibition on double punishment, the trial court granted Lee *summary* probation on the child abuse homicide conviction (the court found *formal* probation was not appropriate), and sentenced him to 11 years on the manslaughter conviction.

### *Sentence Reversed in Trahan I*

The People appealed Lee's sentence as unauthorized, arguing summary probation is unavailable for felony convictions such as child abuse homicide and, therefore, the court's only sentencing options were *formal* probation or 25 years to life. We agreed, and reversed and remanded for resentencing.

### *Resentencing*

#### *Probation Report*

At the resentencing hearing, the trial court relied on the probation officer's report from the original sentencing hearing. The probation officer noted Lee was eligible for probation, but recommended against it. In favor of granting probation, the officer cited Lee's clean criminal record, his willingness and ability to perform on probation, and his military service. On the other hand, Lee's victim was vulnerable, and he "violently assaulted his five-week-old infant daughter," "failed to provide her with medical attention," "lied to officers during the investigation," "provid[ed] a false story of the injury," and "attempted to hide [his] knowledge of Willow's abuse by deleting text messages from [his] smartphone[]." The probation officer stated she was "not able to determine [Lee]'s level of remorse" because he would not discuss the underlying facts of the offense. On balance, the probation officer concluded "a grant of probation would be inappropriate and would significantly depreciate the seriousness of the crime."

The probation officer recommended that the court sentence Lee to 25 years to life on the child abuse homicide conviction, and the aggravated term of 11 years on the manslaughter conviction. The probation officer opined that the sentence on the



manslaughter conviction should be stayed under section 654 because both convictions "refer to the same course of conduct" occurring between mid-March 2012 and April 27, 2012.

#### *Lee's Sentencing Memorandum*

Lee filed a postappeal sentencing memorandum asking the court to declare a 25-year-to-life sentence for child abuse homicide cruel and unusual as applied to the facts of his case. He "accepted" that the previously imposed 11-year sentence was "constitutional," "fair," and "just."

Alternatively, if the court did not deem his sentence cruel and unusual, Lee asked the court to grant him probation. Lee cited his "blameless" and "exemplary" behavior during his five years of incarceration, and the favorable testimony of his character witnesses during trial.

#### *Prosecution's Sentencing Memorandum*

The prosecution filed a postappeal sentencing memorandum arguing that 25 years to life was not cruel and unusual as applied to Lee in light of the nature and extent of Willow's injuries. The prosecution also argued probation was unwarranted because Lee repeatedly inflicted injuries on his child, "the most vulnerable victim imaginable"; prevented Willow from getting medical attention; discussed it with Jessica; searched the Internet about "getting mad at a crying infant"; showed no remorse; and only stopped because Willow eventually succumbed to her extensive injuries.

The prosecution argued the court should impose the statutorily prescribed sentence of 25 years to life for Lee's child abuse homicide conviction. The prosecution

acknowledged that section 654 prevented the court from also punishing Lee for his manslaughter conviction because "the evidence adduced at trial and the arguments of the People" showed that "both counts are based upon the same acts of violence against Willow." Based on section 654's requirement that a defendant be punished under the provision that provides for the longest potential sentence, the prosecution maintained the court must sentence Lee for his child abuse homicide conviction rather than for his manslaughter conviction.

### *Resentencing Hearing*

At the resentencing hearing, counsel argued consistently with the points raised in their sentencing memoranda. The prosecutor reiterated that section 654 applies and, therefore, the trial court was again "stuck with the quandary . . . of having to decide between 25 years to life" and granting probation. Defense counsel agreed that section 654 applied, but argued the trial court had a third option available: find 25 years to life cruel and unusual, and resentence Lee to 11 years in prison.

The court weighed the factors relevant to probation and found they favored a denial:

"[Lee] has no record. Shows a willingness to comply. . . . And he has the ability to comply. Contrasted with the nature of the physical injury, which in this case was death. But probably more important, I think, and the one that is most significant to me is [California Rules of Court,<sup>5</sup>] rule 4.414(a)(3) as to the vulnerability of Willow and what I would describe as the violation of position of trust. I cannot in good conscience give the defendant a grant of probation."

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<sup>5</sup> Further rule citations are to the California Rules of Court.

The court next found that under counsel's mutual understanding of section 654, the court was required to impose the 25-year-to-life sentence for Lee's child homicide conviction. The court expressed its view that although this sentence "is too harsh," it is not "cruel and unusual." The court explained it could fashion a more fitting punishment by declaring the prescribed punishment cruel and unusual, but the court stated it could not "legally, philosophically, and in good [conscience] . . . find that the facts of this particular case constitute cruel and unusual punishment."

Accordingly, the trial court sentenced Lee to 25 years to life on the child abuse homicide conviction. The court imposed, but stayed under section 654, the aggravated 11-year term on the manslaughter conviction.

## DISCUSSION

### *I. Ineffective Assistance of Counsel Regarding Section 654*

Under section 654, a defendant who commits a single act or indivisible course of conduct that violates more than one statute may be *convicted* of more than one offense, but may be *punished* for only one of those convictions. (§ 654, subd. (a).)<sup>6</sup> When section 654 applies, the trial court must sentence the defendant "under the provision that provides for the longest potential term of imprisonment" (§ 654, subd. (a)) and stay

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<sup>6</sup> Section 654, subdivision (a) provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

execution of sentence on the duplicative conviction(s) (*People v. Tom* (2018) 22 Cal.App.5th 250, 260). Because the trial court found that section 654 applied to Lee's child abuse homicide and manslaughter convictions, and because the child abuse homicide conviction provides for the longer potential term of imprisonment (25 years to life versus 11 years), the trial court was required to sentence Lee on that conviction and stay execution of the sentence on the other.

Lee makes a novel argument on appeal. He contends that because the trial evidence showed that he abused Willow on multiple occasions, his trial counsel should have argued that his child abuse homicide and manslaughter convictions were not based on the same conduct and, therefore, section 654 did not apply. This, he theorizes, would have allowed the trial court to grant him formal probation on the child abuse homicide conviction and sentence him to 11 years on the manslaughter conviction. We are not persuaded that Lee's legal representation was ineffective.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212, citing *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide

range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

The crux of Lee's theory is that because the evidence adduced at trial showed that he abused Willow on multiple occasions, section 654 did not apply because his multiple convictions were not based on a single act or indivisible course of conduct. Although the record shows multiple instances of abuse, Lee offers no logical explanation for how the conduct that resulted in his child abuse homicide conviction differed from that which led to his manslaughter conviction. To the contrary, the record indicates the conduct was the same.

First, the operative charging document alleged the same underlying facts for Lee's child abuse homicide and manslaughter counts. On the child abuse homicide count, the pleading alleged: "*On or about and between March 17, 2012 and April 27, 2012, [Lee] . . . did assault Willow . . . by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . .*" (Italics added.) Similarly, on the murder count (on which the jury acquitted Lee, but convicted him of the lesser included offense of manslaughter), the pleading alleged: "*On or about and between March 17, 2012 and April 27, 2012, [Lee] did unlawfully murder Willow . . .*" (Italics added.) The pleading did not otherwise distinguish between conduct supporting these counts.

Second, the prosecutor argued in closing that the child abuse homicide and murder counts were based on the same conduct. Lee acknowledges this, but counters that "the jury did not agree entirely with the prosecution's view of the evidence" because the "jury

rejected the . . . murder charge and instead found [him] guilty of manslaughter."

Although Lee is correct that the jury convicted him on the lesser included offense of manslaughter, he does not explain how his underlying conduct or intent differed for this conviction versus his child abuse homicide conviction. To the contrary, the fact the jury acquitted Lee of murder indicates the jury found his intent in committing manslaughter was more akin to his intent in committing child abuse homicide.

Indeed, in this regard, his trial counsel observed during the resentencing hearing that the jury understood both counts were based on the same conduct: "[I]n talking with the jurors after[]" the verdicts, "[w]hat they believe to be the case was that the assault charge, the [section] 273ab, was sort of the predicate that gave them the basis to convict on voluntary manslaughter as though it were [a lesser included offense]." This shows that Lee's trial counsel believed the jury based Lee's multiple convictions on the same conduct. It was, therefore, not ineffective assistance for counsel to argue contrary to this understanding. (See *People v. Bell* (2019) 7 Cal.5th 70, 127 ["[c]ounsel was not ineffective for failing to raise a futile objection"].)

In addition, the Attorney General posits Lee's trial counsel may have had a valid tactical reason for not arguing against section 654's application: "Failure to apply this section would have allowed the court to impose consecutive terms, leading to a total sentence of 25 years to life *plus* 11 years." (Italics added.) As Lee points out, however, such an outcome seems unlikely in light of the trial court's view that 25 years to life was "too harsh," and that the court previously tried to fashion an 11-year term.

A more likely tactical reason for not arguing against section 654's application is to put the court back in "the quandary . . . of having to decide between 25 years to life" and granting probation, with the hope that—in light of the fact that Lee had already served five years in custody—the court would opt for granting probation rather than 25 years to life. This approach would likely have fallen within the broad range of deference we grant to trial counsel's tactical decisions.

In any event, either because an argument that section 654 did not apply would have been unfruitful, or because trial counsel had another valid tactical reason for not making the argument, Lee has not met his burden of showing he received ineffective legal assistance.

## II. *Cruel and Unusual Punishment*

Lee contends the 25-year-to-life sentence on his child abuse homicide conviction constitutes cruel and/or unusual punishment under the federal and state Constitutions.

We disagree.

The Eighth Amendment to the United States Constitution applies to the states and prohibits the infliction of "cruel *and* unusual punishments." (U.S. Const., 8th Amend., *italics added*.) Similarly, the California Constitution prohibits the infliction of "[c]ruel *or* unusual" punishment. (Cal. Const., Art. I, § 17.) Although there is a slight " 'distinction in wording' " that " 'is "purposeful and substantive rather than merely semantic," ' " there "is considerable overlap in the state and federal approaches." (*People v. Baker* (2018) 20 Cal.App.5th 711, 723, 733.) " 'The touchstone in each is gross disproportionality.' " (*Id.*

at p. 733.)<sup>7</sup> We review de novo the constitutionality of a statutorily mandated sentence, considering the maximum possible indeterminate term. (*Id.* at pp. 722, 723.)

In *Lewis, supra*, 120 Cal.App.4th 837, our court held that a sentence of 25 years to life for a child abuse homicide conviction was not cruel and unusual in the abstract, or as applied to the facts of the case. (*Id.* at pp. 854-856.) For the as-applied analysis, the court considered "the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, the consequences of the act, the defendant's age and history of criminality and the defendant's mental capabilities." (*Id.* at p. 856.)

The defendant in *Lewis* was convicted of the child abuse homicide of his four-month-old son. (*Lewis, supra*, 120 Cal.App.4th at p. 842.) The day before the infant sustained fatal injuries, his scrotum became swollen and painful, which the defendant explained resulted from the defendant grabbing the child's crotch when the defendant fell while carrying him. (*Id.* at p. 845.) The day after the crotch incident, the defendant called 911 to report that the victim "slipped in the tub, went into the water and was not breathing." (*Id.* at pp. 842-843.) The baby was taken to the hospital, where he died the next day. (*Id.* at pp. 844-845.) The prosecution's medical experts rejected the defendant's explanation of the victim's scrotal injuries, and concluded the victim did not die from

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<sup>7</sup> Because of the similarity in approach, we will refer to the federal and state standards collectively as "cruel and unusual punishment." (See *People v. Lewis* (2004) 120 Cal.App.4th 837, 854, fn. 5 (*Lewis*).)



drowning but, rather, from "shaken baby syndrome." (*Id.* at pp. 845-846.) The victim had old and new rib fractures, retinal hemorrhages, and subdural hematoma around his spinal column; fresh blood in his skull; and extensive brain hemorrhages caused by the brain hitting the skull. (*Id.* at pp. 845-846.) The experts concluded the infant "had been violently shaken on at least two occasions"—once about two months before his death, and once within hours of his arrival at the hospital. (*Id.* at p. 846.)

In finding that the *Lewis* defendant's sentence of 25 years to life was not cruel and unusual as-applied, the *Lewis* court explained: "[The defendant] is a relatively young man without a criminal record. Still, the amount of force required to cause [the] four-month-old [victim]'s fatal head injuries and the amount of anger and loss of control that led to the assault all lead us to conclude while the punishment imposed is harsh, it is not disproportionate to [the defendant]'s culpability." (*Lewis, supra*, 120 Cal.App.4th at p. 856.)

Like the defendant in *Lewis*, Lee "is a relatively young man without a criminal record." (*Lewis, supra*, 120 Cal.App.4th at p. 856.) And also like the defendant in *Lewis*, Lee lost control, became angry, inflicted serious injuries on Willow on multiple occasions, and fabricated excuses rejected by medical experts. Additionally, after one incident, Lee communicated with Jessica about "snapping" and "hitting" Willow, and he delayed seeking medical attention for her. Lee admitted he probably deleted these communications to prevent CPS from discovering them. Finally, Willow's fatal injuries resulted from the application of "a great degree of force" comparable to a serious car accident, a fall from a great height, or a television falling on a child's head. On such a

record, we cannot say Lee's sentence of 25 years to life is grossly disproportionate to his culpability.

### III. *Denial of Probation*

Lee contends the trial court abused its discretion by denying him probation on his conviction for child abuse homicide. He, in essence, asks us to reweigh the trial court's weighing of factors. We decline to do so.

" 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' " (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311, disapproved on other grounds in *People v. Cook* (2015) 60 Cal.4th 922, 939.)

Rule 4.414 provides "[c]riteria affecting the decision to grant or deny probation[,] includ[ing] facts relating to the crime and facts relating to the defendant."<sup>8</sup> The

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<sup>8</sup> Rule 4.414(a) identifies the following "[f]acts relating to the crime": "(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] (2) Whether the defendant was armed with or used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and

probation report, which the trial court read and considered, balanced these factors and concluded "a grant of probation would be inappropriate."

The trial court also weighed the relevant factors. The court expressly stated it considered Lee's clean criminal history, and his willingness and ability to comply with probation terms. But the court "[c]ontrasted" these factors "with the nature of the physical injury" and, "probably more important, . . . and the one that is most significant . . . is . . . the vulnerability of Willow and . . . the violation of position of trust."

Indeed, even Lee acknowledges that several facts relating to the crime support the trial court's decision to deny probation: "the nature of the crime was serious, Willow was vulnerable, [Lee] was an active participant who inflicted physical injury, and he arguably took advantage of a position of trust." He simply contends the trial court gave too much

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[¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime."

Rule 4.414(b) identifies the following "[f]acts relating to the defendant": "(1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; [¶] (2) Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction; [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others."

weight to these facts rather than to the other facts relating to the crime and the facts relating to the defendant.

On this record, the trial court did not abuse its discretion in denying Lee probation.

#### DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.